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In the Supreme Court of the United States.

No. 145.

OCTOBER TERM, 1902.

GUSTAVUS LEACH, ET AL.

vs.

CHARLES R. BURR, EXECUTOR, ET AL.

BRIEF FOR DEFENDANTS IN ERROR.

R. B. BEHREND,
J. J. DARLINGTON,
Attorneys for Defendants in Error.

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BRIEF FOR DEFENDANTS IN ERROR.

This cause presents an appeal by the plaintiffs in error, caveators, from a decree of the Orphan's Court admitting to probate and record the will of the late Ezra W. Leach.

Mr. Leach died on the 21st day of December, 1896, leaving a last will and testament executed on that day, a few hours before his death. By this instrument, set out on page 20 of the record, he gave all his property to the defendant in error Samuel H. Lucas, and appointed the defendant in error Charles R. Burr, executor. The testator had resided in the District of Columbia since the close of the Civil War,

was childless and unmarried, had been a Government clerk for some years, and had afterwards conducted a florist's establishment, residing in Anacostia and living alone with his devisee, Samuel H. Lucas. He had taken the latter when a small, homeless, colored boy, had reared and educated him, had associated him with himself in his flower business, and, during the latter years of his life, had left the business wholly to Lucas, to whom he was much attached.

His estate consisted of three parcels of real property in Anacostia, worth in the aggregate about eight thousand dollars ($8,000), one of which parcels was a dwelling house adjacent to the church of which he was a member, and which he had long intended to give to the church for use as parsonage, the principal part of the remaining real estate being the property used in his business as a florist. His personal estate was inconsiderable, aggregating something less than three hundred dollars.

On December 21st, 1896, after an illness of about eight days, finding himself unexpectedly at the point of death, the testator sent for his pastor, Rev. Hugh T. Stevenson, stated that he had not anticipated that the end of his life was so near, that he had desired to perform some things which he had neglected, that he had wished to give a parsonage to the church, but could not now do so in view of the law of Maryland in force in the District of Columbia which rendered void gifts to religious uses unless made for a prescribed period before death, and that he wished Mr. Stevenson to prepare a deed conveying all the property to Lucas, at the same time telling Lucas what he would like to have done in reference to a parsonage for the church. Mr. Stevenson prepared such a deed, to the best of his ability, and the testator signed and acknowledged it before Dr. A. M. Green, a notary public; but Mr. Stevenson, who had never before prepared a deed, expressed some fear whether it was in proper form and suggested that a will might be better. The testator thereupon directed Mr. Green to pre-

pare a will, who accordingly wrote the paper in controversy, which the testator signed in the presence of four witnesses, one of them being his medical attendant. There was no delivery of the deed, it remaining in the possession of the executor, and, indeed, not appearing to have been fully completed. Record, p. 22. After the death of the testator, the will having been offered for probate, a caveat was filed in the names of certain persons purporting to be his cousins, heirs and next of kin in varying degrees, under which caveat issues were made up and tried in March, 1899, resulting in the direction of a verdict by the Court in favor of the will, upon the testimony offered by the caveators themselves.

The above proceedings had been instituted before the Wills Act of June 8, 1898, and were accompanied by an ejectment suit, which, under stipulation, was to have been tried with the issues; but, when reached for trial, the ejectment suit was discontinued by the plaintiffs, rendering the jury trial of slight practical effect; and thereupon, under Section 8 of the Wills Act, which had been passed in the meantime, and which provided that "any person interested under any will hertofore filed in said Court may offer the same for probate as a will of real estate," the executor filed a second petition, a second caveat was interposed, and, on November 2nd, 1899, the three issues printed on pages 4 and 5 of the Record were ordered for trial, the first presenting the question of the testator's mental capacity, the second that of undue influence, and the third that of fraud.

At the trial of these issues, the presiding justice again ordered a verdict for the will, as to each of them, upon the testimony offered on behalf of the caveators, and the only exception presented by the Record is to this action of the Court. Record, p. 25.

POINTS AND AUTHORITIES.

This brief is written under the disadvantage of having neither the opposing brief, nor any statement of errors

which are to be relied upon in this Court. As shown by the opinion of the Court of Appeals, at page 32 of the Record, the assignments of error in that Court were complicated and confused, but amounted in effect to the four following:

1. That the trial court below was without authority or jurisdiction to admit to probate and record, because the procedure required by Section 4 of the Act of June 8, 1898, had not been followed.

2. That the publication as to the non-resident parties was not in accordance with the provisions of the Act.

3. That it was error to direct the jury to render a verdict for the caveatees, and

4. That the evidence showed disposition by deed of the testator's property, leaving nothing upon which the will could operate.

I.

The provisions of Section 4 of the Act of June 8, 1898, require that the heirs-at-law or next of kin of the testator be summoned to appear before the justice holding the Probate Court, ten days before the will is presented for probate and record; that, should any of the parties in interest be returned "not to be found," then not less than thirty days' notice of the application for probate shall be published, that due proof of the publication shall be made, etc., etc.; and the first of the above assignments of error was based upon the fact that the Record does not show these several preliminary proceedings.

Section 2 of Rule V of the Court of Appeals of the District of Columbia, following a series of provisions for reducing the volume and expense of records and transcripts on appeals, provides for a stipulation between the parties to an appeal as to the parts of the original proceedings which shall constitute the transcript. Following the provisions of this rule, the counsel for the plaintiffs in error designated

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the parts of the Record relied upon on their behalf as the basis of their appeal, which designation was thereupon assented to by the attorneys for caveatees. Record, page 26.

As pointed out above, the only exception reserved in the case was to the action of the Court in directing a verdict for the caveatees upon the three issues presented, namely, those as to mental capacity, undue influence and fraud. Nowhere in the Record had there been the semblance of objection to the sufficiency of all those former preliminary proceedingsto which this first assignment of error relates. The only "appeal allowed herein," referred to in the stipulation at page 26 of the Record, was that set forth, at page 14, from the order admitting the will to probate and record; and the only objection to this order was the motion in opposition by the plaintiffs in error at page 13 of the Record, based upon the alleged execution and delivery of a deed conveying the testator's property prior to the execution of the will.

Even if every objection on the part of the caveatees, at any stage of the proceedings, could have been considered as available for consideration in the Appellate Court, notwithstanding the absence of either exception or appeal as to any of them other than the two above noted, those objections would have been the four following, and no others, namely:

1. That the Wills Act of June 8, 1898, does not apply to the case of wills offered for probate prior to its passage. Record, p. 5.

2. That the provisions of the Statute in regard to publishing notice of the date assigned for the trial had not been complied with. Record, p. 8.

3. That the testator had by deed conveyed his property prior to the execution of his will, and therefore did not die seized of it. Record, p. 13.

4. That the Court erred in holding the evidence insufficient for submission to the jury upon the questions of men-

tal incapacity, undue influence and fraud. Record, p. 25.

It was in a case presenting at most these questions, and no others, that the counsel for the appellees was asked to assent by stipulation to the parts of the Record to be included in the transcript for the hearing of the appeal in the Appellate Court. The stipulation shows that the transcript is of "part of the Record" only, being simply that "designated for transmission to the Court of Appeals of the District of Columbia as a basis of the appeal allowed herein." At the hearing in the Court of Appeals, that tribunal permitted the original papers constituting the complete Record to be brought up from the court below for its inspection, when, as is stated in its opinion at page 33 of the Record, it was found that all the proceedings required by Section 4 of the Wills Act had been regularly taken.

To procure by stipulation, under a rule designed to spare the parties unneccessary expense, the omission of parts of the Record as being unnecessary to consideration of the appeal, and then, in the Appellate Court, to contend that the judgment appealed from should be reversed because the stipulated parts of the Record do not show certain necessary preliminary proceedings which had actually taken place, and which would have appeared of record in the Appellate Court but for their ommission under the stipulation, is a practice which the Court of Appeals very properly held could not be sanctioned.

Apart from the above objection, a proposition that the plaintiffs in error, after appearing in the court below, interposing a caveat to the will offered, causing issues to be made up for trial by a jury, and occupying the time of the Court and jury for days in the attempt to sustain the contentions raised by their caveat, may in the Appellate Court, obviate the effect of their defeat by claiming then, for the first time, that the transcript of the parts of the Record which they had procured by stipulation to be transmitted to that Court does not contain the evidence that they had

been duly summoned to appear, can scarcely be seriously contended. As is apparent from the Record, no such question was raised in the trial court.

"In no case will this Court decide any point or question that was not fully presented for decision by the Court below." Rule 5, Court of Appeals, D. C., Sec. 3.

It may be that this assignment of error will not be relied upon in this Court; but, as stated, this brief is prepared at the last moment, after ineffectual effort to obtain a copy of the opposing brief, or of the assignments of error which it will present.

II.

Section 6 of the Wills Act provides that, where the required notice of the date of trial shall be returned "not to be found" as to any of the parties in interest, the court shall assign a new day for trial, and shall order publication at least twice a week for a period of not less than four weeks, of a copy of the issues and notification of trial in some newspaper of general circulation in the District of Columbia. The affidavit of J. Whitt Herron (Record page 9) shows that this notice was published in the Star on January 26th and 30th, and on February 2nd, 6th, 9th 13th, 16th and 20th, 1900, the first advertisement appearing on Friday, January 26th, and the last on Tuesday, February 20th, and the publication being twice a week for four weeks in the ordinary acceptance of the term. The objection under the second assignment of error is that a "week," in the sense of the statute, means from Sunday to Saturday, both inclusive, and that the advertisement should have appeared twice between Sunday and Saturday for four successive weeks, instead of twice in four successive periods of seven days, not necessarily commencing with Sunday, the authority cited in support of this proposition being Ronkendorff *vs.* Taylor, 4 Pet., 349, 361.

That the word "week" in the Act is not justly subject to

the techincal construction thus sought to be affixed to it, and that Ronkendorff *vs.* Taylor is not authority for such a claim, is pointed out in the opinion of the Court of Appeals, at pages 33-4 of the record.

In addition, the very language of the Wills Act negatives the claim. It is that the court shall order publication, at least twice a week, not "*for four weeks*," but for "*a period of not less* than four weeks." The publication proven in this case cannot be claimed to have been for "a period less than four weeks." Had the first advertisement appeared on Tuesday January 30th, instead of on Friday, January 26th, and had its last appearance been on Friday, February 23d, instead of on Tuesday, February 20th, thus conforming literally to the construction urged, the publication would have been for a day less than the period which it actually covered.

In other words, the contention is not only one without merit, but is in conflict with even the letter of the statute, as well as with its substantial object and meaning. See Early *vs* Homans, 16 How., 616-17.

If anything further were necessary, it will be observed that the objection in question is made by certain of the caveators, who appeared, generally, by their counsel, that these caveators, with the others, accepted without objection the position of plaintiffs by the court's order at the trial (Record pp. 10, 14 and 15), and that they thereupon proceeded with the trial of the case to verdict and judgment. Having appeared generally, having accepted without objection the position of plaintiffs in the cause at the trial of the issues, and having proceeded without objection on this score to trial, verdict and judgment, the objection in question cannot be available at this stage of the case, even if otherwise possessed of merit.

III.

Under the third assignment of error, it was argued prin-

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cipally below that, under the Wills Act, the court is without power in any case to direct a verdict. No authority for this proposition was cited, nor, it is believed, exists. The contrary has long been the practice both in this jurisdiction, in Maryland and elsewhere. Manogue *vs.* Herrell, 13 D. C. App., 455; Raub *vs.* Carpenter, 17 D. C. App., p. 519; Wagner *vs.* Zeigler, 44 Ohio State, 59.

In addition, as is pointed out in the opinion of the Court of Appeals at page 35 of the Record, the Wills Act, in terms, provides that the trial justice shall have "the same power to set aside the verdict and grant a new trial that is possessed and exercised by the Supreme Court of the District of Columbia in cases tried with a jury according to the course of the common law, and as to such trials shall have *all other* powers now vested by law in the Supreme Court of the District of Columbia holding a special term as a circuit court." The power to direct a verdict for the defendant in cases where there is no evidence upon which an adverse verdict can be rendered, has always been among the powers vested by law in the Circuit Court.

This brings us to the only question really presented by the record, namely, whether, upon the testimony adduced on behalf of the caveators, there was any evidence to go to the jury upon the question of the testator's sanity, or of the procurement of the will by either undue influence or fraud.

No evidence in support of the second and third of these issues was attempted, even. The burden as to each of them was upon the caveators, who offered no testimony whatsoever tending, however remotely, to prove that the execution of the paper by the testator was "procured by threats, menaces and duress exercised over him by Samuel H. Lucas or any other person or persons," or that it was "procured by the fraud of Samuel H. Lucas, or any other person or persons."

The sole inquiry, therefore, is whether there was any evidence sufficient for submission to the jury, tending to

show that the testator was at the time of the execution of the will of unsound mind, incapable of executing a valid deed or contract.

Upon the question of the actual mental condition of the testator, the witnesses offered were Warren W. Rawson, George E. Fairbanks, Lois C. Cushing, and Rev. Hugh T. Stevenson, the latter being one of the attesting witnesses.

Mr. Rawson, a florist of Boston, saw the testator but once, in July, 189[illegible], at which time the testator called upon him to inquire about the use of electricity in connection with the growth of plants, Rawson being the pioneer in that use. He testified that he thought testator "was a very peculiar man," because he asked "peculiar questions and still would repeat questions that he had formerly asked;" and that he observed nothing else upon which he based that opinion. Record, p. 15. On cross-examination, he added that the testator appeared to believe that witness had some trade secret in relation to the effect of electric heating upon the growth of flowers, as many other persons did, which he was concealing, and that the questions which were repeated were in relation to that subject; and that he could not bring to mind any facts showing peculiarities upon the testator's part. Record, p. 16.

Mr. Fairbanks testified that he worked in the same shop with testator from 1850 to 1862; that he always had "eccentric ways about him," and, upon being interrogated as to what these eccentric ways consisted of, answered: "Well, he was pretty set in his disposition against anything that did not exactly suit." The instances given of this eccentricity were that, on one occasion when a series of religious meetings were being held in the church to which testator belonged, a man who was in the habit of ridiculing everything of a religious nature, and who had brought with him a gang of young men pretending to be interested, but really for the purpose of making sport, undertook to participate in the meetings, and that the testator "got right up in meeting

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and told him to sit down;" and that at another time he got into a difficulty with the pastor of the church and was considerably excited—these incidents occuring prior to the Civil War, the witness further testifying that he could not recall any facts nearer to the time of testator's death than the two mentioned. Record, pp. 16-17. He adds that he never at any time saw any lack of mental ability upon the part of the testator to make contracts or to do any acts which he desired, and that he never doubted his mental and business ability to make contracts. Record, p. 17.

Mrs. Cushing, the testator's cousin, also testified that she had known testator from her earliest recollection, that she never saw any change in him up to the time of his death, that she never observed anything about him other than normal in so far as his mental condition was concerned, and that she never heard his mental condition questioned until after his death, when this question about his property arose, although she used to see a great deal of him. Record, pp. 18-19.

Mr. Stevenson, the testator's pastor, after stating the facts already set forth attending the execution of the will, testified that he was one of the attesting witnesses, that the testator was of sound mind and capable of making a valid deed or contract at the time of its execution, that he had been witness's chief adviser and counsellor in all church matters, that he was one of the deacons of the church, a member of the board of trustees, a member of the finance committee, treasurer of the board of deacons, and an incumbent of other offices of the church down to the time of his death, and that he was also a member of the executive committee of the Baptist denomination in the District of Columbia; that he was a man of excellent ability, of considerable intelligence, and well competent to transact any business up to the very end of his life, and that witness observed no change in his business capacity, memory and ability up to the time of his death.

The only other testimony offered to show mental incapacity was that of sundry physicians to the effect that a man dying of *acute* pneumonia is usually in a comatose condition for some hours before his decease, and that a man dying of that disease would not be capable of making a valid will, deed or contract within three or four hours of his death. One of these witnesses, Dr. Richardson, who was the only one interrogated upon that point, testified, however, that this unconsciousness preceeding death, found in cases of acute pneumonia, was not characteristic of death from bronchial pneumonia, which fact was not disputed by any other witness; and that, in his opinion, upon the facts attending the execution of the will as testified to by Mr. Stevenson, the testator was not laboring under any mental disability to make a valid deed or contract. Record, p. 20.

The only evidence in the case in the nature of an attempt to show the cause of the testator's death, and to which the expert testimony is supposed to relate, was the death certificate from the Health Department printed at page 19 of the Record, in which the cause of death is stated, not as "acute," but as "bronco-pneumonia." This certificate, required only by a police regulation of the District of Columbia as a prerequisite to a burial permit, was not a public record in such sense as to make it evidence between private parties of any facts recited therein. Buffalo Loan Company *vs.* Knights Templar *et al*, 126 N.Y., 450, 458; Sovereign Camp of Woodmen *vs.* Grandon, 89 N. W. Rep., 448, 451; Kerr *vs.* Met. Ry. Co., 57 N.Y. Supp., 794; Drier *vs.* Continental Ins. Co., 24 Fed. Rep., 670, 672; 2 Phil. Ev., 280, 287, 290.

If, however, the rule were otherwise, the death certificate showed death, not from acute, but from bronco-pneumonia, which form of the disease, as shown by the above noted and undisputed testimony in the case, is unaccompanied by the unconcious or comatose conditions testified to as preceding death from acute pneumonia.

That the cavators not only failed to produce the slightest

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evidence to go to the jury tending to support the allegation of mental incompetency or incapacity on the part of the testator, but that they proceeded to prove, conclusively, the very reverse of their case, demonstrating both by the direct testimony and by that of the expert medical witnesses the validity of the will, does not admit of dispute, upon the record in the case.

IV.

The fourth assignment of error rests upon the proposition that, if a testator originally contemplates disposing of his property by a deed, which is accordingly prepared and signed by him, but the execution of which is not completed and which is never delivered because, pending its completion and delivery, he determines to dispose of his property by will instead, the will executed under such circumstances is legally incapable of admission to probate and record.

That an undelivered deed is without any effect is elementary.

The deed itself, at the time of the trial, was in the possession of the testator's executor, but was not called for or offered in evidence for any purpose. And, as is pointed out in the opinion of the Court of Appeals at page 37 of the Record, if it were valid, effective and sufficient to convey to the defendant in error Lucas all the testator's property as claimed, it is not apparent how the plaintiffs in error could be prejudiced by its admission to probate. "If the grantee already has good title under the deed as against the appellants, certainly the appellants cannot be injured by such confirmation, if any, as the will may give to the previous grant."

Respectfully submitted,

R. B. BEHREND,
J. J. DARLINGTON,
For Defendants in Error.